***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S REPLY BRIEF

77-7169

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

ABNER HARKAVY,

Plaintiff-Appellant

-against-

Docket No. 77-7169

APPAREL INDUSTRIES, INC. and
S. M. ELOWSKY,

Defendants-Appellees

----------X

# APPELLANT'S REPLY BRIEF

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# APPELLANT'S REPLY BRIEF

The reference in appellees' brief (p. 2) to Judge Bonsal's statement at the end of the trial (156a) that this was a "factual" matter is misleading. For there is no real dispute about the facts, as appellees themselves say (p. 2). The dispute is about the meaning of the facts; the materiality of the matters not disclosed.

## POINT I

## THERE WAS A FAILURE TO DISCLOSE MATERIAL FACTS

Appellees' brief (p. 6) stresses the testimony of Messrs. Jaffe and Elowsky that there had been no "corporate plan" to market the junior line until the middle of 1970 and

that the status at the time the Women's Wear article was published late in November 1969 was just "talk." But the article (227a) speaks for itself and it is much more than just talk. It says they are "working" on the plans. Surely appellant was entitled to be informed of the existence of the article. Mr. Jaffe admitted that it was accurate (74a). And it is undisputed that appellant was not informed about it.

That fact distinguishes this case from those relied on by appellees. In Arber v. Essex Wire Corporation, 490 F. 2d 414, and Barnett v. Kirshner, 527 F.2d 781 (Brief, p.8), there was no claim that the buyer had failed to inform the seller of a published statement of its intention, only that management had had some secret intention.

The citation (p. 9) of S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, is irrelevant. Appellant does not claim that he was deprived of any expert analysis. But he does claim that he was denied information about a material fact - the publication of the article. The last case cited (p. 10), Marx v. Diners' Club, Inc., 550 F.2d 505, is even less relevant. For there a purchaser claimed he had acted in expectation of a takeover of another business sooner than it had happened. All the Court decided was that there had been no time specified as to when the takeover would occur. Here we

claim only that appellant, before selling his 3,000 shares, was entitled to be informed of a fact, and that this was a material one. Knowledge of the publication of the article may well have led him to put off the sale until he had learned more about the company's intentions with regard to the resumption of the junior line.

The argument (p. 12) with regard to the 1969 shareholders agreement misses the point. Appellant argues that he was entitled to be informed of the purchases made under that agreement and the possibility of further purchases since each substantial purchase would increase his equity in the business to the extent that the real value of the shares might exceed their book value. The reference (p. 13) to the fact that he received the same price as another shareholder is totally irrelevant.

## POINT II

## THE 1946 AGREEMENT IS NOT APPLICABLE

Appellees (Brief, pp. 13-15) completely misconceive the meaning of the 1946 agreement (228a). It has nothing to do with the case since it refers only to stock of Kordeen which no longer exists. And when counsel started to cross-examine appellant with reference to this agreement (39a), Judge Bonsal quite properly said "That would apply to Kordeen

stock and not the Apparel stock" (40a).

When Mr. Elowsky was on the stand the agreement was again referred to and the witness said it covered Apparel stock, but the Court noted that it referred to Kordeen stock (97a). Discussion among the Court, counsel and the witness followed during which it developed only that the Apparel stock in the opinion of defendants' counsel was a "substitute" for the Kordeen stock under a plan of reorganization to which appellant had consented (98a, 99a). But there was no evidence that there was any understanding that the 1946 agreement should apply to the Apparel stock and it would have been very simple for appellees, who drafted the agreement, to have so provided. Indeed, when Apparel was about to take over the House of Morrison business in early 1969 it entered into an agreement with four of the Morrison stockholders (see 52a-56a) which bound them to give a first refusal. This is Plaintiff's Exh. 1 (167a), par. 7 (173a). And paragraph 17 provided for an endorsement on the certificates (188a, 189a). There is nothing comparable in any agreement with appellant.

And the 1946 agreement was completely ignored by Judge Bonsal in his opinion (158a-163a). And it properly has no place in this case, and the cases cited (Brief, pp. 14, 15) are not applicable.

## POINT III

## THERE IS NO ISSUE OF FACT

Appellees' brief (p. 2) says that the essential facts are undisputed. We agree. They argue (pp. 15-17) that this Court should not reverse because we have not shown that Judge Bonsal's findings of fact were clearly erroneous. But we are not here dealing with findings of fact. We are challenging the Court's legal conclusion that the failure to disclose the Women's Wear article and the purchases of over 10% of its stock was not material.

## CONCLUSION

The judgment appealed from should be reversed and the case remanded for a hearing as to damages.

Respectfully submitted,

AUSTRIAN, LANCE & STEWART
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OSMOND K. FRAENKEL
DAVID BROWN
Of Counsel

Service of ~~three~~ (2) copies of the within is hereby admitted

this day of

.....

Attorney(s) for

COPY RECEIVED (HAND) MAIL

WARSHAW, SYLVESTER, BURSTEIN & FRANKS

ATTORNEYS FOR Defendants

DATE 8/24/77 10:05 A.M.